No. 18642

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

MILES CONSTRUCTION CORP.,

Appellant,

vs.

HELEN H. DEMPSTER, *et al.*,

Appellees.

APPELLANT'S OPENING BRIEF.

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I.

Jurisdiction.

This action initially was commenced in the Superior Court of the State of California, in and for the County of Los Angeles. [Tr. Vol. I, p. 42.] Defendant Miles Construction Corp. filed a Cross-Complaint naming Great American Insurance Company as a cross-defendant. [Tr. Vol. I, p. 52.] Great American Insurance Company filed a "Cross-Complaint to Quiet Title to Personal Property" naming therein the United States of America as cross-defendant, and invoking the consent of the United States to suit granted by Title 28, U. S. C. §2410. [Tr. Vol. I, p. 7 and p. 8, lines 19 and 20.] This section conferred jurisdiction upon the District Court, and also upon the State Court.

Defendant United States of America removed the action to the United States District Court, for the

Southern District of California, Central Division [Tr. Vol. I, p. 2], invoking the jurisdiction conferred by Title 28, U. S. C. §§1441, 1442, and 84(b)(2). [Tr. Vol. I, p. 4, lines 11-15.] These sections conferred jurisdiction on the District Court, and jurisdiction to hear this appeal is conferred by Title 28 U. S. C. §§41 and 1291, as this is an appeal from a final decision of the United States District Court. [Tr. Vol. I, pp. 197 and 212, *et seq.*]

II.

Statement of the Case.

While the pleadings are quite voluminous, the facts are to a large extent undisputed, and, with respect to the issues here, are not complicated. Chronologically, they are as follows:

On October 8, 1956, Appellant Miles Construction Corp. (hereinafter referred to as "Miles") entered into a written Agreement with A. T. Locke. [Tr. Vol. I, pp. 59-67, incl.] A. T. Locke (hereinafter referred to as "Locke") assigned a portion of his interest to John M. Sherman (hereinafter referred to as "Sherman"), and on December 27, 1956, Miles, Locke and Sherman entered into a written Amendment to the Agreement of October 8, 1956. [Tr. Vol. I, pp. 68-72, incl.] The Agreement is also in evidence as Exhibit AA [admitted Tr. Vol. II, p. 5], and the Amendment as Exhibit AC. [Admitted Tr. Vol. II, p. 8.]

The Agreement of October 8, 1956, in its Recitals, casts the background against which the parties contracted. Miles had been incorporated for the purpose of bidding upon, and performing if it were the successful bidder, one or more Military Housing Projects under

the Capehart Act (Title VIII of the National Housing Act) at Little Rock, Arkansas, and other locations; Locke had copies of the plans and specifications, and had performed some work in preparation for bidding.

The Agreement required that Locke go to Little Rock, and, at his own cost and expense, prepare a Bid for submission on the bidding date, October 11, 1956 (which was just three days after the Agreement was executed); in the preparation of the Bid, Locke was to act solely on his own behalf and at his sole cost and expense; he was to have no authority to contract on behalf of Miles, to incur expense on behalf of Miles, to represent Miles in any capacity whatsoever, or to submit a Bid on behalf of Miles; and he was to make available to Miles, and one of its officers, all plans and specifications, bidding information theretofore assembled, and all bidding information assembled during the course of the preparation of the Bid. Locke was to deliver to Miles $25,000.00, to be used as a Bid deposit, not later than 10:00 o'clock a.m., on October 9, 1956. Miles was to submit a Bid on the bidding date. If Miles were the unsuccessful bidder, the other two Projects would be bid in a similar manner, with certain variations not important here. If Miles were the successful bidder at Little Rock, it was to have an option to confirm or reject the Bid; if rejected, Locke was to have certain rights in connection with it; and if Miles accepted the Bid, Locke was to receive $15,000.00 in addition to reimbursement of the bid deposit. If Miles accepted the bid, Locke was to have no participation in the performance of the Contract, and was not to be entitled to exercise any control over perform-

ance. Nothing contained in the Agreement was to be construed as creating a Partnership or Joint Venture between Miles and Locke, or between the principals of Miles and Locke.

Thus, the Agreement itself shows clearly that the reason for the Locke Agreement was that Locke was, at the date of the Agreement, October 8, 1956, in possession of plans and specifications, together with some bidding information which, due to the obvious shortness of time, was needed by Miles, and was presumably essential to the preparation of an intelligent Bid on the Little Rock Project. However, the final determination as to whether or not a Bid would be submitted, and, if so, the amount of it, was left exclusively in Miles, and the Agreement required only that Locke make available such documents and information as he had in his possession when the Contract was executed, and that he travel to Little Rock and perform certain work during the three-day period between October 8, 1956, and October 11, 1956, in addition to advancing $25,000.00, which was to be refunded to him. After the Bid went in, barring the application of the provisions of the Agreement concerning the bidding of other Projects, he was to have no further duties.

The Agreement provided further that Locke was to be additionally compensated, provided that Miles realized certain minimum percentages of "net return" from the Little Rock Project. Paragraph 11 provides:

> ". . . Miles shall pay to Locke the sum of $100,000.00 if, *but only if*, the 'net return', as said term is hereinafter defined, *to Miles*, result-

> ing from the bidding, entering into, and performance by Miles . . . is at least three per cent (3%), but less than six per cent (6%), of the total amount of the Contract between Miles and the United States Government; or, if, *but only if,* the said 'net return' *to Miles* is six per cent (6%), or more, of the said Contract amount, Miles shall pay to Locke the sum of $150,000.00. Provided, however, that there shall be deducted from any sum payable under this paragraph any amount which Miles shall have theretofore paid to Locke on account of bidding expense, or otherwise." (Italics added.)

We have emphasized in the above quotation the key words which, in our view, have a decisive bearing upon the issue before the Court.

Paragraph 12 (as amended by the Amendment to Agreement dated December 27, 1956), contains the definition of "net return". It reads:

> ". . . the amount by which the total receipts of Miles under the said Contract exceed the aggregate of the cost of all labor, materials, and *services* expended or *incurred* in *bidding* the said Project, performing all acts necessary or appropriate to accomplish the construction, and closing . . ., actual construction, financing costs and expenses, and any and all other costs, expenses, charges, fees, taxes . . . deposits, bond premiums, and traveling and other expenses *of any nature whatsoever* expended or *incurred* in connection with such Project . . ." (Italics added.)

Here, also, we have emphasized the key words which, in our view, are determinative of the issue here involved.

In addition to the Assignment by Locke to Sherman of an interest in the Agreement, there were various Assignments made to other parties, that is, to Mr. and Mrs. Warren (Mrs. Warren having become, by marriage, Mrs. Dempster, by the time the action was filed, and having become, by marriage, Mrs. Norman by the time this action was tried), Truman Browne, Great American Indemnity Company (now Great American Insurance Company), Wren & Van Alen, Inc., Philip Yousem, Julian Weinstock Construction Co., and William J. Padden. Also, the United States of America claimed an interest in the funds. These Assignments and claims can, however, largely be discarded here, for the reason that no issue is raised on this appeal as to the priority established, or as to the determination of the validity of the Assignments, by the Judgment.

It appears from the recitals in the Amendment to Agreement dated December 27, 1956 [Tr. Vol. I, p. 68], that the Bid was prepared on the Little Rock Cape-hart Project, submitted, that Miles was declared to be the lowest acceptable bidder thereon, and a Letter of Acceptability was issued to it under date of December 5, 1956.

It also appears from said Amendment to Agreement that at or about December 27, 1956, Miles paid to Locke and Sherman the sum of $40,000.00, consisting of the Bid deposit required by the Agreement of October 8, 1956, to be advanced by Locke, plus the additional $15,000.00 required to be paid to Locke.

Thereafter Miles entered into the construction of the Little Rock Capehart Project, and completed it. Although for most purposes in this litigation, in the interests of convenience, it has been assumed by all parties that there was one Capehart Project at Little Rock, and that Miles performed it directly, there were, in fact, five Capehart Projects, all of which were initially awarded to Miles, which Miles performed as a participant in a separate Joint Venture as to each Project. In addition, there was an Offsite Contract (which was not a Capehart Project), which was performed through a Joint Venture participated in by Miles. [Ex. BI.]

However, Miles initially had, and continued to have, the primary liability under the Agreement of October 8, 1956, as amended, and, therefore, out of recognition of that liability, has participated, and is participating, in this litigation on its own behalf, and as a representative of the Joint Ventures as to which it was a participant. [Tr. Vol. II, pp. 73-74.]

The date on which this action initially was filed in the Superior Court does not appear in the Record. However, the Record does show [Tr. Vol. I, p. 42] that the Amended Complaint was filed in the Superior Court by the plaintiffs on May 10, 1960. It is established, therefore, that the action actually was commenced somewhat prior to that date. The Record also shows that, between the date of the filing of the Amended Complaint in the Superior Court and the date of the filing by the United States of America of its Petition for Removal to the Federal District Court, June 27, 1961, various Cross-Complaints and other pleadings were filed by various parties. [Tr. Vol. I, pp. 7, *et seq.*]

Miles (or, more accurately, the Joint Ventures which actually performed the construction) performed a large volume of the construction work through subcontractors. As is virtually inevitable in any construction activity involving, as here, in excess of $22,000,000.00, there were various disputes and controversies which developed between the United States Government and Miles, and between Miles, its subcontractors and the sureties of the subcontractors.

By May 13, 1960, the actual construction work, to a very large extent, had been completed, and the United States Government had made payment to Miles of the consideration for the performance of the Capehart Act Contracts. However, as of that date, there existed a group of contingencies which made a determination of the amount of "net return" impossible for a protracted period of time.

As of May 13, 1960, there remained a group of controversies and litigation items pending and unsettled between Miles, as the General Contractor, and various of its Subcontractors and their sureties. These were the following:

(1) Mathis Company Heat Pump Controversy: The several Joint Ventures which performed the Capehart Contracts had entered into separate Subcontracts with the Mathis Company for the installation of heat pumps in the houses which were being constructed under the Project. The Contracting Officer of the Department of the Air Force demanded that the heat pumps which had been installed at that time be modified, contending that the heat pumps did not meet the plans and specifications. The Subcontracts to the Mathis Company

had required the installation of these heat pumps pursuant to plans and specifications, and the Mathis Company contended that they did so meet the plans and specifications. The cost estimates for making the modifications required by the Department of the Air Force ranged from $400,000.00 to $600,000.00. The Joint Ventures engaged in numerous conferences, and an appeal to the Secretary of the Air Force. Eventually a settlement was effected, under which the Mathis Company made certain modifications at a cost of approximately $450,000.00. The modifications themselves were substantially completed by April 21, 1960. However, the Mathis Company, after completion of the modifications, asserted a claim against the Joint Ventures for substantial expenses incurred by the Mathis Company in making tests, and certain other expenses incurred in connection with the controversy. These claims were the subject of negotiations toward settlement, and settlement was eventually reached in September, 1960. [Ex. BF, Deposition of Edward Lester, pp. 4-8, incl.]

(2) J. E. H. Construction Associates—New Amsterdam Casualty Company controversy: Each of the Joint Ventures entered into a Subcontract with J. E. H. Construction Associates for concrete work on its segment of the Project. Each of these Subcontracts required the Subcontractor to file a Payment and Performance Bond, which Subcontractor did with New Amsterdam Casualty Company as Surety. J. E. H. Construction Associates encountered financial difficulties, and defaulted on April 17, 1958. The Joint Ventures were required to, and did, complete the work covered by the Subcontracts. The Joint Ventures asserted claims against New Amsterdam

Casualty Company under the Bond for the excess cost of completing the work over the Contract amounts payable to J. E. H. Construction Associates. Extensive negotiations failed to result in settlement, suit was filed against the Surety, further negotiations were had, and on July 29, 1960, a written Settlement Agreement was entered into, as a result of which the action was formally dismissed on August 16, 1960. Under the Settlement Agreement, New Amsterdam Casualty Company paid the Joint Ventures $317,124.84, and assigned to the Joint Ventures a Maintenance and Warranty Escrow Fund in the amount of $9,754.33. [Ex. BF, Deposition of Edward Lester, pp. 8-12, incl.; Ex. BF-1.]

(3) Union National Bank of Little Rock controversy: This controversy was indirectly related to the J. E. H. Construction Associates and New Amsterdam Casualty Company controversy. J. E. H. Construction Associates had been using Union National Bank of Little Rock for interim financing in the performance of its Contracts, and had executed an Assignment of all funds under the Subcontracts in favor of that Bank. At the time of the default by J. E. H. Construction Associates under its Subcontracts, it owed the Bank $58,511.82. On December 4, 1958, the Bank sued the Joint Ventures, claiming that the Assignment of Contract funds constituted a prior Assignment against the Joint Ventures for this indebtedness. It was alleged that the Joint Ventures had paid $58,511.82 to J. E. H. Construction Associates, and had failed to honor the Assignment of

funds to the Bank. After the addition of interest, the total demand in the suit against the Joint Ventures was $71,876.18, and funds in this amount were impounded by the Bank from funds belonging to the Joint Ventures. After the settlement between the Joint Ventures and the New Amsterdam Casualty Company, the Union National Bank of Little Rock action was settled by the payment to the Bank by New Amsterdam Casualty Company of $38,000.00, and Union National Bank of Little Rock paid to the Joint Ventures $68,358.38, representing funds which had been impounded by that Bank. This resulted in the action filed by the Union National Bank of Little Rock's being dismissed on August 30, 1960. [Ex. BF, Deposition of Edward Lester, pp. 12-15 incl.; Ex. BF-2.]

(4) Texas Plumbing Co., Inc., controversies: Texas Plumbing Co., Inc., also was a Subcontractor of the Joint Ventures. It filed two actions against the Joint Ventures, both of which were still pending as of August 3, 1962, one in the Circuit Court of Pulaski County, Little Rock, Arkansas, and the other in the United States District Court for the Eastern District of Arkansas, Western Division, and both of which sought the recovery of $39,869.29. In both of these suits, Texas Plumbing Co., Inc., which was the Subcontractor for the installation of plumbing work, claimed that the Joint Ventures destroyed part of the underground plumbing installed by that Subcontractor, and thereby caused damages in the amount of $39,-

869.29. The suit in the State Court for the same amount asserted a claim for payment of alleged "extras" under the Subcontract, and that the Joint Ventures were negligent in damaging or destroying underground plumbing installed by the Subcontractor. The Federal District Court case, pending as of August 3, 1962, had originally been filed in the State Court on September 14, 1961, and was removed to the Federal Court on June 5, 1962. [Ex. BF, Deposition of Edward Lester, pp. 15-20; Ex. BF-3; and Ex. BF-4.]

(5) Gary H. Reid controversy: Gary H. Reid was the Subcontractor of the Joint Ventures for the brick work. On September 17, 1958, he refused to proceed with the performance of his Subcontracts, and filed suit against the Joint Ventures in the United States District Court, Eastern District of Arkansas, Western Division, for Declaratory Judgment. He subsequently amended his pleadings to seek recovery in the aggregate amount of $29,775.00 for alleged conversion of personal property, loss of anticipated profits, and damages for delay, claiming also breach of Subcontracts by the Joint Ventures. After Reid's refusal to proceed, the Joint Ventures completed the brick work themselves, and the cost was in excess of the Contract amount for three of the Joint Ventures. The Joint Ventures filed a Counterclaim seeking recovery of the aggregate of $36,617.78. The case eventually was tried on November 29 and 30, 1960. After preparation of the Transcript and argument, the District Judge, on

June 21, 1961, rendered his decision, and entered Judgment against Reid and his Surety, Trinity Universal Insurance Company, for the amount of the Joint Ventures' Counterclaim. Gary H. Reid and his Surety appealed to the United States Court of Appeals, for the Eighth Circuit, and the case was taken under submission for decision on March 20, 1962. As of August 3, 1962, no decision had been rendered on the appeal. [Ex. BF, Deposition of Edward Lester, pp. 21-23, incl.] However, prior to the trial of this action, the Court of Appeals rendered its decision affirming the Judgment, and the case was awaiting a threatened Petition for Certiorari to the Supreme Court of the United States. [Ex. BG.]

All of these items of controversy involved litigation expense, consisting of costs of printing Briefs, traveling expense and attorneys' fees, a substantial portion of which remained to be incurred and billed in the future. [Ex. BF, Deposition of Edward Lester, pp. 24-25, incl.]

Contracts between the Government and Contractors on Capehart Projects (*i.e.,* Contracts under Title VIII of the National Housing Act, as amended) were subject, and therefore this Contract was subject, to renegotiation under the Renegotiation Act of 1951. (Title 50, U. S. C., §1216, subdv. (9).)

Miles, through the Joint Ventures which executed the performance of these Contracts, filed timely Renegotiation Reports, which were considered by the

Renegotiation Board, and attained finality on the following dates:

Year	Filed	Date of Finality
1957	1958[1]	August 26, 1960[4]
1958	1959[2]	August 26, 1960[5]
1959	1960[3]	August 26, 1960[6]
1960*	August 16, 1961[7]	August 16, 1962
1961*	April 2, 1962[8]	April 2, 1963

This case came on for trial before the United States District Court, Southern District of California, Central Division, Honorable Harry C. Westover, Judge, presiding, on October 30, 1962, and the trial was completed on October 31, 1962.

In due course, the Court caused to be entered Findings of Fact, Conclusions of Law, and Judgment [Tr. Vol. I, pp. 197-209, incl.], wherein it adjudicated that the various assignees of Locke and Sherman were entitled to recover from Miles the aggregate principal amount of $135,000.00, together with interest thereon from June 13, 1960, to April 26, 1962.

Miles does not challenge on this appeal, in so far as it awards to the various assignees, the Judgment for principal in the amount of $85,000.00, and Miles does not challenge the Judgment, in so far as it determines

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*Statements of Non-Applicability.
[1]Exs. BA to BA-4, incl.
[2]Exs. BB to BB-4, incl.
[3]Exs. BC to BC-4, incl.
[4]Exs. BA-5 to BA-9, incl.
[5]Exs. BB-5 to BB-9, incl.
[6]Exs. BC-5 to BC-9, incl.
[7]Ex. BD.
[8]Ex. BE.

the priority between the various claimants. [Tr. Vol. I, p. 212 *et seq.*]

Miles does challenge the Judgment in so far as it awards the difference between $85,000.00 and $135,000.00 in principal amount to Appellee Great American Insurance Company, and Miles does challenge the Judgment in so far as it awards any interest (save and except only that earned on the $85,000.00 of the Treasury Bills lodged with the registry of the Court during the time that they were so lodged). [Tr. Vol. I, p. 212 *et seq.*] These are the principal issues of this case.

The manner in which these issues were raised in the Court below is as follows: Miles stated, in its initial pleadings, that it was then uncertain as to the amount which would, eventually, be payable under the Agreement of October 8, 1956, as amended. [Tr. Vol. I, p. 52, *et seq.*] However, by the time required by the Court for filing Cross-Claim for Interpleader and Claim of Interest in Interpleader Fund against the funds then on deposit with the registry of the Court, sufficient information was available to Miles for it to determine that, as it considered the Agreement properly to be interpreted, there could not be more than $85,000.00 payable under the Agreement, and that it, therefore, asserted this position in its Claim filed herein. [Tr. Vol. I, p. 116, *et seq.*, and p. 129, *et seq.*]

Appellee Great American Insurance Company, on the other hand, determined, by the time that it was required to file its Claim in Interpleaded Fund, that, under its interpretation of the Agreement, there was payable thereunder the sum of $135,000.00 in principal,

and, also that the claimants to the fund were entitled to interest thereon for a period prior to the date of the initial deposit of the Treasury Bills in the registry of the Court, and so asserted these positions in its Claim. [Tr. Vol. I, p. 124, *et seq.*] Other appellees asserted similar positions as to interest in the claims filed by them.

The parties took the same positions, at Pre-Trial, and on the trial of the action.

On the trial of the action, Miles took the position, [Tr. Vol. II, p. 51, lines 1-2], and consistently maintained it, that the Agreement was free from ambiguity, and that no evidence in aid of interpretation was admissible. [Tr. Vol. II, p. 189, line 9.] The District Judge agreed and so held [Tr. Vol. II, p. 52, line 3; p. 189, lines 10-12], and Miles' position still is that this was a correct ruling.

There was no issue of fact left for determination by, or determined by, the District Court as to the amount of the Government Contract proceeds, and as to the amount of general costs and expenses of Miles. These were stipulated to and agreed to by the parties. [Tr. Vol. II, p. 145, lines 21-25; p. 146, line 20, to p. 156, line 4; p. 200, line 12, to p. 213, line 18.]

Moreover, there was not, in reality, a determination as a factual issue of the amount of "net return" realized as a result of the Capehart Contracts. While the Findings of Fact do contain a purported determination as

to this amount, with which we do not agree, it resulted solely from what we contend to have been an erroneous interpretation of the Contract by the District Judge. What we consider to be the correct interpretation of the Contract would have resulted in the "net return" amount which we contend to have prevailed.

As to the interest issue also, the District Court was not required to, and did not, determine the same through the resolution of a disputed factual issue, or disputed factual issues. The facts upon which this issue was determined were either stipulated to or were undisputed, and the District Court made its determination upon what we submit to have been an erroneous interpretation of the Agreement of October 8, 1956, as amended, and several erroneous conclusions which were drawn from the agreed to, or undisputed, facts.

III.

A Specification of Errors Relied Upon by Appellant Is as Follows.

1. That the United States District Court erred in interpreting the Agreement of October 8, 1956, as amended by the Amendment of December 27, 1956, as allowing the assignees of A. T. Locke and John M. Sherman the gross principal sum of $150,000.00, and the net principal sum of $135,000.00, instead of the gross principal sum of $100,000.00 and the net principal sum of $85,000.00, against the undisputed evidence that Appellant Miles Construction Corp. did not realize a "net return" of 6% or more of "the total

amount of the Contract between Miles Construction Corp. and the United States Government", as said terms are defined in said Agreement, as amended; and that Findings of Fact 19, 20, 22, 25, 26, 27, 28 and 29, the Conclusions of Law, and Judgment are, in that respect, unsupported by the evidence.

2. Said Court erred in interpreting the said Agreement of October 8, 1956, as amended, as calling for the payment of any sum thereunder from Miles Construction Corp. on the date which was thirty days after the receipt by Miles Construction Corp. of final payment under the Contract with the United States Government, despite the fact that the said Agreement of October 8, 1956, as amended, calls for such payment to be due on or before thirty days after the date on which Miles Construction Corp. received final payment under such Contract, or the date on which Miles Construction Corp. paid all costs and expenses incident to the performance of the said Contract, or the date on which Miles Construction Corp. has ascertained, by proper accounting procedures, the amount which would, by the said Agreement, be the "net return", whichever was the later date; and that Findings of Fact 19, 20, 22, 25, 26, 27, 28 and 29, the Conclusions of Law, and Judgment are, in that respect, unsupported by the evidence.

3. The said Court erred in finding, contrary to the undisputed evidence, that on or prior to May 13, 1960, Miles Construction Corp. had paid all costs and ex-

penses incident to the performance of the said Contract with the United States Government; and that Findings of Fact 19, 20, 22, 25, 26, 27, 28 and 29, the Conclusions of Law, and Judgment are, in that respect, unsupported by the evidence.

4. The said Court erred in finding, contrary to the undisputed evidence, that Miles Construction Corp. was able, by proper accounting procedures, to determine, at or prior to May 13, 1960, the amount which would, by the said Agreement of October 8, 1956, as amended, be the "net return" thereunder, and Findings of Fact 19, 20, 22, 25, 26, 27, 28 and 29, the Conclusions of Law, and Judgment are, in that respect, unsupported by the evidence.

5. That the said Court erred in adjudicating that any amount became payable under the Agreement of October 8, 1956, as amended, prior to April 26, 1962, and that the said Court, therefore, erred in awarding interest against Appellant Miles Construction Corp. to Appellees Helen H. Dempster, William J. Padden, Truman Browne, and Great American Insurance Company from June 13, 1960, to April 26, 1962; and that Findings of Fact 25, 26, 27, 28, and 29, the Conclusions of Law, and Judgment are, in that respect, unsupported by the evidence.

6. That the said Court erred in adjudicating that the following Appellees were entitled to recovery from the interpleaded funds, or otherwise, of more than $25,-

000.00, without interest, as to Appellee Helen H. Dempster, $10,000.00, without interest, as to Appellee William J. Padden, $7,500.00, without interest, as to Appellee H. Truman Browne, and $42,500.00, without interest, as to Appellee Great American Insurance Company; and that Findings of Fact 19, 20, 22, 25, 26, 27, 28, 29 and 30, the Conclusions of Law, and Judgment are, in that respect, unsupported by the evidence.

7. That the said Court erred in finding that it was stipulated by all parties that A. T. Locke performed all acts required by him to be performed pursuant to the said Agreement of October 8, 1956, as amended December 27, 1956; and that Findings of Fact, the Conclusions of Law, and Judgment are, in that respect, unsupported by the evidence.

8. That the Court erred in finding that on December 28, 1956, A. T. Locke and John M. Sherman assigned to Wren & Van Alen, Inc., all moneys due, or which might thereafter become due, to A. T. Locke and John M. Sherman, from Miles Construction Corp., pursuant to the said written Agreements, and that the Findings of Fact No. 6, the Conclusions of Law, and Judgment are, in that respect, unsupported by the evidence.

9. That the Court erred in finding that Miles Construction Corp. stipulates and agrees that all interest on the Treasury Bills deposited with the Registry of the Court is the property of the assignees of A. T. Locke and John M. Sherman, and Findings of Fact 30, the Conclusions of Law, and Judgment are, in that respect, unsupported by the evidence.

IV.

Argument.

1. Summary.

In this case, the District Court had before it a Contract which required Miles to pay to Locke a sum of money in the future, which was contingent, as to whether any amount at all would be payable, upon whether or not Miles realized a "net return" on the Capehart Contracts with the Government, was further contingent as to the amount of money which would be payable dependent upon the amount of "net return" which was realized by Miles, and, lastly, was contingent as to the time that the same would be payable.

By Stipulation and undisputed evidence, the District Court had before it the text of the Agreement, the gross Contract receipts and the costs. It also had before it the contingent undetermined matters which left in a state of vast uncertainty, until down to the time of trial, the question as to how much the costs were, and, therefore, as to how much "net return" was, or would be, realized.

As we shall develop in the appropriate sections of this argument, Appellant Miles contends that the District Court erroneously interpreted the Agreement in such a manner as to award to the assignees of Locke the maximum amount of principal which could have been payable under the Agreement, as amended, although this result is prohibited by the express language of the Agreement itself, and, therefore, does violence to every rule of construction and interpretation. We also contend that, in determining that interest was payable to the assignees of Locke, the Court disregarded the

plain language of the Agreement, and undertook, in effect, to rewrite the Agreement, following the lead of the appellees, to make it read consistently with appellees' argument.

2. **The Court Interpreted the Agreement Erroneously in Deciding That the Appellees Were Entitled to the Maximum Amount in Principal Thereunder.**

Before turning to a discussion of this interpretation, it is in order to set down what we are talking about in dollars and cents. The total Contract Receipts on the Capehart Contracts between the United States Government and Miles are, consistently with the Stipulations and the Findings, $22,611,439.58. [Ex. BI, top of p. 1; Tr. Vol. I, p. 203, lines 21-23.]

After the making of various adjustments (only one which is in dispute and is referred to in the next paragraph), the total costs, as adjusted, were $21,-301,175.95, resulting, on these computations, in a "net return" of $1,310,268.63, and a "net return percentage" of 5.579 of the Contract Receipts of $22,611,439.58. [Ex. BI, p. 2.]

Essentially, none of these *figures* are in dispute. Concededly, however, the correctness of the inclusion in "cost of work in process", on the first page of this exhibit, of the sum of $150,000.00, and the deduction of the sum of $51,000.00, in the middle of page 2 of this exhibit, are challenged by Appellee Great American Insurance Company (hereinafter referred to as "Great American") and these items necessarily go to the heart of this issue. That which Great American contends (and that which, under Great American's inducement, the District Court was led to determine by its Judg-

ment) is that no part of any amount payable, or which might have been payable to, or for the account of, Locke under the Agreement should be considered as a part of "costs" in arriving at "net return"; that which Great American urged, and that which the District Court did, was to eliminate from costs any amount payable under the October 8, 1956, Agreement, as amended, from which the conclusion was then drawn that costs were only $21,199,175.73 [Findings 19 and 21, Tr. Vol. I, pp. 204-205], resulting in a "net return" in excess of 6%, and in the gross amount of $150,000.00 being payable under the Agreement, as amended.

Since Paragraph 11 of the Agreement requires Miles to pay a sum of money to Locke, dependent upon the amount of "net return", as otherwise defined in the Agreement, it is first in order to turn to Paragraph 12, which contains this definition. It is:

> ". . . the amount by which the total receipts of Miles under the said Contract exceed the aggregate of the cost of all labor, materials, and services expended or incurred in bidding the said Project, performing all acts necessary or appropriate to accomplish the construction, and closing . . . . actual construction, financing costs and expenses, and any and all other costs, expenses, charges, fees, taxes . . . deposits, bond premiums, and traveling and other expenses of any nature whatsoever expended or incurred in connection with such Project. . . ."

This is, and obviously was intended to be, an all-inclusive definition of "costs". It specifically referred

to labor and materials, and to the cost also of *services* expended or incurred in *bidding* the Project, as well as all costs incident to actual construction, financing, etc.

The Record shows that Miles performed these Contracts under a percentage-of-completion method of accounting. [Tr. Vol. II, p. 94, line 20, to p. 95, line 16.] By this is meant, of course, that a Contractor establishes, at the outset of his work, an estimated cost as to each item which will be incurred from the beginning to the end of performance; for example, if a Subcontract which is let for all of the cement work totals, say, $1,500,000.00, this will be set up, or "accrued", at least for percentage-of-completion accounting, along with all of the other items of cost, whether represented by Subcontracts or contemplated to be performed directly by the General Contractor, and, therefore, estimated by him.

Presumably, the Contractor would not have bid on the Contract in the first place unless he had estimated a profit representing the difference between the aggregate of the estimated cost of all of the items involved in carrying out the Contract, and the estimated Contract receipts. (Even the Contract receipts are necessarily estimated, because the Government has the privilege of making changes, deletions, or additions to the Contract, which will increase or decrease the Contract receipts, as compared with those reflected by the Contract in the first instance.)

Then, as the work progresses, and Contract proceeds are received, generally monthly, such Contract proceeds being disbursed to the Contractor on the basis of percentage of completion, are charged to each of the

items set forth in the estimate, including anticipated profit, according to the percentage that that item has been completed, and the difference, after such charges as to other items, is set up against the estimated profit.

Admittedly, the accounting method employed by Miles in the performance of the Capehart Contracts has little or nothing to do with the interpretation of the Agreement of October 8, 1956, as amended. However, an explanation of this accounting method is important with reference to the manner in which the potential liability under the October 8, 1956, Agreement, as amended, was handled.

The evidence shows that, initially, Miles contemplated the realization of in excess of 6% profit on the Capehart Contracts, and, therefore, consistently with the percentage-of-completion method of accounting, tentatively set up the aggregate of $150,000.00 as a liability against this Contract. Prior to the commencement of construction, Miles disbursed to Locke and Sherman $15,000.00, which was admittedly chargeable against this initial liability, which left the amount tentatively set up and undisbursed at $135,000.00. As this Contract did not fall in the category of a labor and material Contract (*e.g.*, cabinets, the work on which was not even commenced until toward the end of construction), there was charged against it month to month a percentage representing the estimated percentage of completion which had occurred during the previous month.

It is, of course, true that, regardless of the accounting methods, the actual amount payable under the Agreement of October 8, 1956, as amended, could not

possibly be determined until all of the dust had settled, and the performance of the Contract had achieved finality. Therefore, if Miles had initially, for example, estimated a net return of, say, 4%, and if, when all the dust was settled, it turned out that the net return was 6½%, due to Miles' having overestimated costs, or for any other reason, it would follow that a larger amount than that initially set up in the estimate would be payable, and would not, in any way, be affected by the initial estimate.

It is clear that, regardless of what accounting method may have been employed, Miles commenced performance with a *potential liability* under the Agreement of October 8, 1956, as amended. Moreover, since Miles initially estimated a net return in excess of 6%, this potential liability initially assumed, and until all the dust had settled would continue to assume, the status of one reasonably to be anticipated to occur. At the very minimum, however, Miles must be held to have been required to assume that it would have to pay at least a gross of $100,000.00 under the Agreement of October 8, 1956, as amended. Accordingly, it must be said that the moment the Capehart Contract was awarded to Miles, it *"incurred,"* within the exact meaning of Paragraph 12 of the Agreement, a liability to Locke or for his account, of at least a gross amount of $100,000.00, against which it paid, at December 27, 1956, $15,000.00.

While a catastrophe in the performance of the Capehart Contracts conceivably could have eliminated this as a liability, that is a speculation which is unproductive, for the reason that it did not occur. Thus, it

must be fairly said that, at the inception of the Project, Miles had a liability under the Agreement of $100,000.00, representing the cost of *a service incurred in bidding the Project,* that this liability necessarily continued down to the date of the trial, and the various events which increased or reduced costs still in the process of occurring down to the date of the trial did not have, or could not have had, any effect on this minimum liability.

We think it probably unnecessary to turn to the books for a definition of the terms "expended" or "incurred." Certainly this is so as to the word "expended." This means "paid out in cash."

At the risk of stating the obvious, we shall deal with the meaning of the word "incurred," as to which we find some assistance in the California authorities.

In *Limited Mutual Compensation Insurance Co. v. E. G. Curtis,* 45 Cal. App. 2d 507, 114 P. 2d 404, where the question was one of venue, and specifically whether the obligation to pay premiums had been "incurred" in the City and County of San Francisco, California, the Court held that the provision in the policy requiring the payment of premiums in San Francisco constituted the "incurring" of the obligation under §395 of the California Code of Civil Procedure, with the result that venue properly lay in the City and County of San Francisco.

In *Capuccio v. Caire,* 215 Cal. 200, 277 Pac. 475, 73 A. L. R. 8, where the question was whether attorneys' fees in a partition action under Code of Civil Procedure

§796 had actually to have been paid before they could be allowed, the Court held that a reasonable construction of the Code Section was that the word "expended" should be deemed equivalent to the word "incurred," and that the fees had been "expended" when the obligation to pay them arose.

In *Weinberg v. Heller,* 73 Cal. App. 769, at 780, 239 Pac. 358, the Court held that it was not necessary to show proof of actual payment of attorneys' fees and costs under an agreement reading: ". . . the undersigned shall not be required to advance or pay any cost or expense incurred by said attorneys, except that the Weinberg Company . . . shall advance and pay eight-fifteenths (8/15ths), and that Rosa Heller shall advance and pay seven-fifteenths (7/15ths) of all the costs of court incurred in this action . . ." The Court said:

> ". . . when the expense was incurred, Weinberg became liable therefor, and by the terms of the contract seven-fifteenths thereof then became due from the appellant. The legal definition of the term to 'incur' has been announced in many decisions in various jurisdictions. The supreme court of Oklahoma, in *Bank v. Eckles,* 19 Okl. 159 [91 Pac. 695], said:
>
> > 'The word "incurred" is defined by Webster as "to become liable for or subject to"; "to render liable or subject to." Black says: "Men contract debts. They incur liabilities. In the one case, they act affirmatively; in the other, the liability is incurred or cast upon them by

> operation of law. 'Incur' means something beyond contracts, something not embraced in the word 'debt.' "

The Court also quotes from *In re McElheny,* 91 App. Div. 131 [86 N. Y. Supp. 326], where it is stated:

> " 'Suffered' means 'paid,' 'incurred' means 'become liable for.' The language is, 'we hold ourselves responsible for costs and damages which may be incurred by said Van Dolsen,' not 'which he may suffer'; and the purport of the language is the same as though it read 'which he may become liable for,' because *the incurring of a liability does not necessarily mean that such liability has been paid."* (Emphasis ours.)

In *County of Kings v. Scott,* 190 Cal. App. 2d 218, 11 Cal. Rptr. 893, where the question was whether or not a County had a fixed and imposed charge against a defendant for hospitalization, the Court held that where the joint pre-trial statement stipulated that the Couny had "incurred" bills for hospitalization, and that the amount stated was "now due", could only mean that the County of Kings had a fixed and imposed charge against the defendant, the Court saying:

> "The word 'incurred', when used in connection with bills or expenses, means to become liable for and to have liability thrust upon one by act or operation of law."

It must be fairly said, from both common knowledge and from the above authorities, that a cost which is "incurred" includes a cost which is "expended" or paid,

and it also includes a cost which is an obligation even though not paid, and that a cost is no less "incurred" when the amount of it is uncertain at the time of its origin than it would be if the amount were certain at the time of its origin. Dictionary definitions tell us that we "incur" an obligation when we commit an act of negligence injuring the property or person of another, although it remains for future adjudication or determination as to the amount of that obligation. The incurring occurs as a result of the act, and the obligation itself may be forced upon us by operation of law.

It follows beyond question, then, that Miles "incurred" an obligation to Locke when it executed the Agreement of October 8, 1956. At the point of execution, its sole obligation was to cooperate with Locke, and, in good faith, put together a Bid on the Little Rock Project, reserving to itself the decision as to whether it would submit that, or some other, Bid.

However, if Miles were the successful bidder, and if it elected to take the Contract, then it incurred, at the point of that election, two obligations: (1) To pay Locke $15,000.00; and (2) To pay Locke an additional sum of money, if certain events transpired in the future.

We are not, of course, concerned here with the $15,000.00, since this admittedly was paid along with the reimbursement of the Bid deposit.

However, it is clear that, when Miles elected to take the Contract, it "incurred" an obligation to pay an additional sum of money under given circumstances.

Without reference to the time when payment should be made (which is specifically spelled out in the Agreement and dealt with elsewhere), if it could be tenably argued an obligation in excess of $15,000.00 was not initially incurred in favor of Locke, an obligation inevitably became "incurred" when events occurred which made "net return" more than 3%, regardless of whether anyone had computed or investigated this question. Moreover, at least $100,000.00 was so "incurred" when events had transpired which showed "net return" to be more than 3%, regardless of whether or not the $100,000.00 was considered a part of cost.

How can it be said, then, that when it was ascertained that Contract receipts and costs were such as to yield a "net return" of more than 3%, regardless of whether or not any sum of money under the Agreement was considered as a part of costs, that the amount so "incurred" is not a part of net costs under the definition contained in the Agreement?

We return now to Paragraph 11, which says that "Miles shall pay to Locke the sum of $100,000.00 if, *but only if,* the 'net return' . . . *to Miles,* resulting from the bidding, entering into, and performance by Miles . . . is at least three per cent (3%) . . ."

Concededly this provision came into play, and no question exists as to the gross amount of $100,000.00 being payable.

Paragraph 11 then goes on to say that "if, *but only if,* the *said 'net return' to Miles* is six per cent (6%), or more, of the said Contract amount, Miles shall pay to Locke the sum of $150,000.00." (or an additional $50,000.00).

It must here be pointed out that Appellant Miles is *not* contending that this additional $50,000.00 is to be deemed a part of costs in determining the amount payable to Locke under the Agreement. Such a contention is unnecessary, and would, therefore, be misplaced. The inclusion or exclusion of this additional $50,000.00 as a part of cost does not change the result.

The fact remains that the precise language of the Contract states that the only circumstance under which there is payable the additional $50,000.00 is that the "net return" to Miles must be 6%, or more, of the Contract amount.

The District Court eliminated the initial $100,000.00, which as we have seen was incurred as one of the costs the moment the Capehart Contract was awarded to Miles, despite the fact that it was incurred as a part of bidding expense, and, as a result, concluded that the "net return" to Miles was $100,000.00 more than it actually was, and that Miles, therefore, realized a "net return" of more than 6%.

This does extreme violence to the express language of the Agreement. By so concluding, the District Court has cut the "net return" to Miles to 5.57%. The addition of $50,000.00 to Miles' costs, as claimed by them in Exhibit BI, brings the costs actually to $21,351,175.95, reduces net return to $1,260,263.63, and results in an effective percentage of net return *to Miles* of 5.57. This result is reached in the face of clear and unequivocal language in the Agreement that "if, *but only if,* the 'net return' to Miles is 6%, or more," shall the additional $50,000.00 be paid.

3. The District Court Erred in Failing to Follow Accepted Rules of Contract Interpretation.

It is clear that this Agreement, executed in California, to be performed (as to payment) in California, and being litigated between California residents, is to be interpreted under California law.

California Civil Code §1641 requires that

> "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other."

We submit that, in interpreting the Agreement as was done in the Judgment, the District Court ignored this injunction, when it refused to give effect to the "*if, but only if*" clause.

This Agreement is neither an "Employment Agreement", nor is it a "Profit-Sharing Agreement", but, if cases dealing with either of these have a bearing, they are, in so far as we can discover, unanimous in holding that express contract language controls, and must be given full effect. *Bishop v. Kelly,* 100 Cal. App. 2d 775, 224 P. 2d 814 (1950).

Bishop v. Kelly also suggests the proper approach to the construction of the Agreement in the case at bar. There, an employee was entitled to a salary and a share in profits. The Trial Court ordered that the referee determine net profit, after deducting "liabilities incurred for operating expenses *including the salary paid to defendant.*" (Italics added.) (100 Cal. App. 2d at p. 781.) In the case at bar, the Agreement requires *setting aside* 3% of "net return" to Miles, *before* Locke is entitled to anything other than $15,000.00 al-

ready paid, and when, by this process, Locke becomes entitled to $100,000.00, it must, like the defendant's salary in *Bishop,* be considered "incurred", and added to costs in determining "net return" as to the remaining $50,000.00. This is the exact result achieved in Exhibit BI.

Our research has led us to no case holding or suggesting that, where a contract calls for setting aside to one party a specified amount or percentage before a specified amount or percentage is to be paid to the other, the initial amount or percentage to be set aside is to be disregarded. On the contrary, what light the cases do shed is squarely in the opposite direction.

For example, *Winkelman v. General Motors* (D. C. S. D. N. Y.), 44 F. Supp. 960, discloses that 7% of "capital employed" was first to be set aside from net income, before remaining profits were to be divided, *across the board,* between executives and shareholders. No one even had the temerity to suggest that this did not mean exactly what it said. Obviously, if 7% of "capital employed" had been equal to, or less than, net profit, there would have been nothing to share *across the board.*

In the case at bar, the Agreement required that these steps and procedures be engaged in in determination of the amount payable under it:

1. To ascertain, under the definition in the Agreement without regard to any amount payable to Locke, the "net return" that Miles realized.

2. If this is more than 3% of Contract Receipts, then it is established that Locke is entitled to additional compensation.

3. If the "net return" originally arrived at shows that Miles realized a net return in excess of 3% of Contract Receipts and if after setting 3% of Contract Receipts aside to Miles, there remains $100,000.00 in net return, then Locke becomes clearly entitled to $100,000.00.

4. At this point in the computation the cost figure must necessarily be revised because it has now been ascertained that Locke is clearly entitled to at least $100,000.00. Therefore the cost figure initially used must be increased by $100,000.00, and the computation must be made to ascertain whether or not this allows a net return which is more than 6%.

5. "If and only if" (to use the express contract language) this yields a percentage of more than 6, is Locke entitled to anything in addition to the $100,000.00 less the $15,000.00 already paid. The amount in excess of such $100,000.00 would depend upon the extent to which there was sufficient money to pay Miles its 6% of Contract Receipts.

Here the application of these rules, which are mandatory under the Agreement, yields the precise result for which we contend. The application of these rules shows that once it is apparent that Miles has realized more than its full 3%, and once it is apparent that the payment of $100,000.00 will not result in an erosion of Miles' 3%, then the $100,000.00 becomes allocated to cost, resulting in reduction of net return by $100,000.00, and the net return so arrived at, when compared with gross receipts, is 5.795%. This is less than 6%, and it follows that since Miles has not achieved 6% or more, Locke is entitled to nothing more than the $100,000.00.

4. **Even if the Principles of Interpretation Adopted by the District Court Are Conceded, No More Than $85,000.00 Became Due Under the Agreement.**

In Finding 24 [Tr. Vol. I, p. 204], the Court found:

> "24. On May 13, 1960, Miles Construction Corp. received payment for the construction of the said Capehart Housing Project, and prior thereto and as an inducement therefor, represented to the Government of the United States that all construction costs had been paid or provided for."

In Finding 25, immediately following, the Court found:

> "25. It is not true that Miles Construction Corp. paid any costs of construction, as defined in said Agreements referred to in Paragraphs 2 and 4 of these Findings, after May 13, 1960."

These Findings, together with the Judgment based upon them, demonstrate clearly that the District Court concluded that a proper interpretation of the Agreement was that *any* event which occurred subsequent to May 13, 1960, could not be considered in determining the amount of "net return", and the percentage which this bore to Contract receipts.

Assuming, for the purpose of argument, that this conclusion is valid, the further conclusion inevitably follows that the maximum amount which could be payable under the Agreement is $85,000.00, even if no part of the amount payable under the Agreement is regarded as costs in determining "net return", as the following reconstruction will show.

For purposes of reconstructing the situation as of May 13, 1960, we refer to Exhibit BI, which shows "Cost of Work in Process" at $21,659,500.12. Other adjustments of relatively small amounts should be considered for an entirely accurate reconstruction, but they obviously would not change the result of this reconstruction.

However, for the purpose of this reconstruction, we deduct from this figure of work in process the sum of $150,000.00 (being the gross amount initially accrued on the books with reference to the Locke Agreement), and admittedly included therein. This deduction reduces the Cost of Work in Process figure to $21,-509,500.12. This results in the net return being approximately $1,100,000.00, and the percentage of net return to Contract Receipts being approximately 4.86%. (It is obvious, without going further, that if the figure of $28,931.28, at the bottom of page 1 of Exhibit BI, were added to costs, and the figure of $19,462.94, shown at the top of page 2 of Exhibit BI, were deducted from costs, they would effect no change of significance.)

This 4.86%, as we have noted, is arrived at by the backing out of the Work in Process figure the entire amount payable under the Locke Agreement. Even after doing so, the percentage figure dictates that the gross amount of $100,000.00, and a net amount of $85,000.00, in principal, would have been due, and no more, under the Agreement.

In concluding otherwise, the District Court had to reach *beyond May 13, 1960*, and pull in the recovery which the Joint Ventures later gained upon the settle-

ment of the litigation involving J. E. H. Construction Associates, and New Amsterdam Casualty Company. This amount was $316,792.51. [Ex. BI, p. 1; Ex. BF, pp. 10-11.]

This recovery was not, in any sense of the word, a Contract receipt, because it was not a part of the moneys paid by the United States Government to Miles. Indeed, no contention has been made that it should be treated as a part of Contract receipts. If it has any effect, it is only to reduce costs, but its recovery did not occur until substantially after May 13, 1960, the date on which the District Court held that rights under the Locke Agreement became "fixed".

It follows that, if the District Court did not commit error in finding [Finding 25] that Miles was paid no construction costs after May 13, 1960 (and we contend elsewhere in this Brief that this Finding was in error), then, according to all concepts of logic, the recovery by Miles on the settlement of the litigation must be disregarded.

Perhaps, however, the District Court intended to hold, and held in effect, one or the other of the two following things:

(1) That at May 13, 1960, there became due under the Locke Agreement the amount of money which net return and percentage of net return to gross receipts then dictated. As we have seen above, this percentage was approximately 4.86% (even without considering as a part of costs any amount payable under the Agreement). Thus, the conclusion is inescapable, under this approach, that a gross amount of $100,000.00 in prin-

cipal became irrevocably "incurred", and, therefore, properly to be "accrued", as of that date. When so incurred and so accrued, it necessarily became irrevocably, as of that date, a part of costs. Perhaps, also, following this line of reasoning, the District Court held, or intended to hold, that the determination as to whether there would be an additional $50,000.00 payable under the Agreement would have to abide a final determination of the contingencies which would either thereafter reduce or increase costs. If so, this line of approach does not support the Judgment.

For a determination as of May 13, 1960, that, as of that date, there was payable under the Locke Agreement a gross amount of $100,000.00 forces the addition of this gross amount to costs, and the subsequent accrual of the J. E. H. —New Amsterdam recovery, does not change the result; *the result is precisely as set forth in Exhibit BI.*

(2) Perhaps, again, the District Court intended to hold, and did hold, that, as of May 13, 1960, there should have been accrued contingent and estimated claims against Miles which might, and, to the extent of litigation expense inevitably would, add to costs and reduce net return, and that there should also be deemed to be accrued as of May 13, 1960, possible recoveries by Miles, which would subsequently reduce costs, and thereby increase net return.

While hindsight, and only hindsight, tells us, and even this only partially, what would have been the appropriate amounts to consider subject to accrual as of May 13, 1960, and, therefore, this involves a vast area

of speculation, it is illuminating, or at least interesting, to engage in such a speculation.

The fact that litigation was then pending with the New Amsterdam Casualty Company would scarcely justify an "accrual" of that which was eventually recovered. However, assume for the purpose of argument that $200,000.00 is "accrued" as something which might reasonably be expected to reduce costs in the future as to this contingency. Deducting this from the Work in Process figure of $21,659,500.12 leaves $21,459,500.12. Without going farther, and after making the admittedly appropriate other adjustments, this would have left total costs, as so adjusted, at $21,417,968.46 (arrived at by adding the excess of the actual subsequent J. E. H.—New Amsterdam recovery above $200,000.00, or $116,792.51, to total cost, as adjusted, shown on page 2 of Exhibit BI.)

This figure, however, still includes $100,000.00 of the $150,000.00 initially accrued under the Locke Agreement, so, for the purpose of argument here, we deduct $100,000.00, leaving $21,317,968.46.

This, without considering any contingencies, leaves a net return which is less than 6% of Contract receipts.

However, obviously and logically, other accruals would have to be made.

The Bank in Little Rock apparently had run a non-judicial "attachment" against Miles by impounding in excess of $71,000.00 of its funds. [Ex. BF, p. 14.] These were, as of May 13, 1960, unavailable to Miles, although they are not expensed as a cost in the Work in Process figure. At May 13, 1960, however, Miles

was threatened with the loss of them. For purposes of argument and engaging in this speculation, we assume that $40,000.00 should be accrued here.

Gary H. Reid had asserted claims aggregating approximately $30,000.00 in principal, and Miles had Counterclaims aggregating $36,000.00 in principal. For purposes of this speculative argument, these, for accrual purposes, may be deemed to offset one another (although, clearly, Miles could have ended up losing its Counterclaim, and having a Judgment against it).

The Texas Plumbing Co., Inc., cases involved a claim against Miles of approximately $40,000.00. This has never been determined, and Miles may yet have to stand this claim, plus its litigation expense and costs, when it is finally adjudicated. For purposes of this argument, we "accrue" this as of May 13, 1960.

Obviously, either an accrual on account of the bank claim or the Texas Plumbing claim would increase costs by $40,000.00, to $21,357,968.46, which would further drop net return below 6%, even if no part of the amount payable under the Locke Agreement were considered as cost.

Thus, if this assumption were the holding of the District Court, the maximum which could be adjudicated to be payable under the Locke Agreement in principal would be $85,000.00.

5. The Court Erred in Allowing Interest.

The District Court, in its Judgment, allowed the appellees interest from June 13, 1960, to April 26, 1962 [Tr. Vol. I, p. 11, line 31, to p. 12, line 20.] Miles' contention is that the facts do not sustain this allowance.

The Agreement is, of course, silent as to interest. The rule is that, when a contract for the payment of money is silent as to interest, the law awards interest at the legal rate from the time it becomes due and payable, if such time is certain or can be made certain by calculation. *Flynn v. California Casket Co.,* 105 Cal. App. 2d 196, 233 P. 2d 131 (1951), and cases therein cited. But if a claim is uncertain or unliquidated, interest is not recoverable until it is made certain and becomes liquidated, by Judgment or otherwise. *Perry v. Magneson,* 207 Cal. 617, 279 Pac. 650 (1929).

The basic question, here, is, when did this claim become "due and payable"? The Agreement tells us. Paragraph 11 says:

> ". . . Said payment shall be due on or before thirty (30) days after the date on which Miles receives final payment under the Contract, or any additions or supplements thereto, or *the date on which Miles has paid all costs and expenses incident to the performance of the Contract,* or the date on which Miles has *ascertained, by proper accounting procedures, the amount which would, by this Agreement, be the 'net return',* whichever is the later date." (Italics added.) [Tr. Vol. I, p. 64.]

The District Court, by its Judgment, ignored *all* of the above-quoted provision, except the part having reference to the date of receipt of final payment. This, alone requires a reversal of the Judgment.

How can it possibly be said that Miles was able to determine the amount which would be "net return" on May 13, 1960 (thirty days before the date on which

the Judgment commences accrual of interest) when, at that date, four major items of controversy and litigation were pending and undetermined; and when Renegotiation was still in progress, together with the attendant costs and expenses, any one of which, or which in the aggregate, would have had, and several of which did in fact have, a substantial effect on the amount of "net return"?

(a) *Contingent Claims and Litigation.*

The answer is obvious. The then pending litigation with J. E. H. Associates and the New Amsterdam Casualty Co., alone, involved several hundreds of thousands of dollars. Recovery on it, and the extent of recovery were not, and could not have been, known. Unless it can be said that this then contingent claim in favor of Miles, as well as all other contingent claims against Miles, are properly to be disregarded for *all purposes,* it cannot be said that "net return" was susceptible to computation on May 13, 1960.

Nor may this date properly be advanced to July 29, 1960, the date of the Settlement Agreement with the New Amsterdam Casualty Co. There remained, long after this date, substantial contingencies which rendered impossible the determination of the amount of "net return."

Actually, as a matter of law, it was not possible to determine the amount of net return until, *at the earliest,* the Gary Reid litigation and controversy achieved finality, a date *later* than April 26, 1962. As a matter of law, so long as Miles was exposed to the danger of a reversal of the Judgment in this case, with the attendant

burden of having the Gary Reid claim, plus its own litigation expense, including attorneys' fees, it was impossible to determine the amount of "net return."

Moreover, simple arithmetic tells us that if the principal amount of the Gary Reid claim against Miles ($29,775.00), and the principal amount of the Texas Plumbing Co., Inc., claim against Miles (still pending, $39,869.29) are added to Total Cost (as adjusted) on page 2 of Exhibit BI ($21,301,175.95 + $69,644.20 = $21,370,820.24) and *$100,000.00 is deducted,* cost would become $21,270,820.24, "net return" would become $1,340,619.34, and percentage of net return would be less than 6%.

In Finding 25, the District Court finds that Miles did not pay any "costs of construction" after May 13, 1960. Exactly what is meant by this escapes us, but if it means payment for labor and materials actually incorporated in the work at the site, it is contrary to the undisputed evidence, and, in addition, we submit is irrelevant. Certainly, it cannot be said *any* claim relating to actual construction is not a construction cost; yet the evidence shows that final settlement of the Mathis Co. Heat Pump matter was resolved and paid substantially after May 13, 1960 [Ex. BF, pp. 4-8 incl.], and this was, beyond a doubt, an actual construction cost matter.

So, also, in fact, as to all other matters of Little Rock litigation. Each of them arose directly from actual construction activity. J. E. H. Associates-New Amsterdam and Union National Bank from concrete work; Gary Reid, brick work; Texas Plumbing, plumbing work.

But even if it were not so, this challenged Finding is irrelevant because the Agreement deals not just with actual construction costs but costs ". . . *of any nature whatsoever expended or incurred in connection with such Project.* . . ." (Italics added.) [Tr. Vol. I, p. 70.]

Therefore, so long as costs and expenses were being incurred, and so long as substantial contingent claims and items remained unresolved, it was not and could not be a fact that Miles had paid "all costs and expenses incident to the performance of said Contract," or that Miles, or anyone else, could ascertain the amount which would be "net return."

It follows that no amount became due and payable under the Agreement prior to April 26, 1962, and that the allowance of interest was error.

(b) *Renegotiation.*

The significance of the evidence on this subject is that, until finality of all Renegotiation proceedings, it was not known, and could not be known, whether Miles was to be permitted to retain all of its Contract Receipts; if it had been required to repay a part of them to the United States Government, this obviously would have reduced "net return".

Renegotiation is provided for in Title 50, Section 1211, *et seq.*, U. S. C.

Section 1216 lists certain mandatory exemptions, the last of which is:

> "Any contract, awarded as a result of competitive bidding, for the construction of any building, structure, improvement, or facility, *other than a*

contract for the construction of housing financed with a mortgage or mortgages insured under the provisions of title VIII of the National Housing Act, as now or hereafter amended." (Emphasis added.)

Title VIII of the National Housing Act is a section of the law popularly known as the "Capehart Act".

It is this provision in the law which rendered the Government Contracts performed at Little Rock, Arkansas, subject to Renegotiation.

Section 1213(i) provides that the terms " 'received or accrued' and 'paid or incurred' shall be construed according to the method of accounting employed by the contractor . . ."

Under §1215(e)(1), the Renegotiation Board is authorized to prescribe by Regulation the form and the manner of submitting Reports. This the Board has done, and the Regulations require that each entity shall file a full Report for any year in which it has Renegotiable business of $1,000,000.00 or more, and that, if any such entity has less than $1,000,000.00 of Renegotiable business, it shall file a Statement of Non-Applicability showing the amount of its Renegotiable business.

In §1215(c), it is provided that no proceedings for Renegotiation shall be commenced more than one year after the Statements are filed, and that, if no agreement or Order determining excessive profits is made within two years following the commencement of Renegotiation proceedings, then, upon the expiration of the two years, all liabilities of the contractor for excessive profits shall terminate.

Here, as shown by Exhibits BA to BC-9, inclusive, BD and BE, full Renegotiation Reports were filed for the years 1957, 1958, and 1959, respectively, and were considered by the Renegotiation Board which determined that, for those years, no Renegotiation repayments were required.

For the year 1960, Statements of Non-Applicability were filed, as Receipts were less than $1,000,000.00. However, this was the year of the J. E. H. Associates—New Amsterdam recovery, and also the year of the final payment under the Contract. These statements were filed August 16, 1961, and the Renegotiation Board, under 50 U. S. C. 1215(c) had one year (until August 16, 1962) within which to commence Renegotiation proceedings thereon.

For this reason alone (as well as in combination with other contingencies), it was not possible to determine, finally, "net return" until August 16, 1962, and it was error for the Court to allow interest for any period prior to August 26, 1962.

6. Miscellaneous Assignments of Error.

In the forgoing argument, we have discussed our position with reference to Assignments of Error Nos. 1 to 6, inclusive. The others we deal with briefly here.

Assignment No. 7: Although the Record does not support a Finding that Miles stipulated that Locke had performed all acts required of him by the October 8, 1956, Agreement, as amended, no issue was raised as to this at the trial, and this Finding, by itself, does not call for reversal. However, out of perhaps an excess of caution, we assign this as error, since, in the event that there is a reversal on other grounds, we cannot be sure

of the course which this litigation might subsequently take, and we do not wish to be bound by a Finding which is contrary to the evidence, in the event the question subsequently may become of importance.

Assignment No. 8: We assign as error the Finding that on December 28, 1956, Locke and Sherman assigned to Wren & Van Alen, Inc., all moneys due or that might become due to Locke and Sherman from Miles under the Agreement. This, again, alone does not require reversal, but it is contrary both to the evidence and to the other Findings, as the evidence showed, and the Court found, that previous Assignments had been made by Locke and Sherman. We, therefore, assign this as error, so that, in the event of a reversal, we would not be bound by a conflicting Finding.

Assignment No. 9: The Record does not support a Finding that Miles Construction Corp. stipulates and agrees that all interest on Treasury Bills deposited with the Registry of the Court is the property of the assignees of A. T. Locke and John M. Sherman. That which Miles did stipulate to was that the interest which such Treasury Bills earned, or might earn, while on deposit with the Registry of the Court, would follow and become the property of the assignees who were finally adjudicated to have an interest in the funds, in proportion to their interest. [Tr. Vol. II, p. 196, lines 2 to 23, incl.] This, alone, also does not require reversal. However, if the action is reversed on other grounds, it should be reversed with respect to Finding of Fact No. 30, as, in that circumstance, an ultimate decision would not necessarily award interest earned on more than the aggregate of $85,000.00 to the appellees.

V.

Conclusion.

By way of summary of its argument, appellant contends that the plain language in the Agreement between the parties requires that, once it becomes clear that the gross amount of $100,000.00 is payable under the Agreement, this amount must be deemed "incurred" as bidding expense, must be added to costs, that the costs, after such addition, must be deducted from Contract Receipts to arrive at "net return", and, when "net return" so arrived at is compared with Contract Receipts, the percentage is 5.795; and that it follows, therefore, that the appellees are entitled to $85,000.00, only, in principal amount.

Appellant further contends that even if the $100,000.00 is not to be deemed "incurred" in this fashion, it properly is to be deemed "incurred" as of May 13, 1960, the date on which the Court held that the amount payable under the Agreement became due and payable, for the reason that, as of that date, and under that ruling, by any process of reconstruction, the percentage which "net return" bore to Contract Receipts was substantially less than 6% *without* the accrual of *any* amount under the Agreement itself; and that, upon such accrual, none of the events which transpired subsequently could, or would, affect the result.

Appellant contends, upon the subject of interest, that, in no event, does the evidence justify a holding that any amount became due and payable under the Agreement prior to April 26, 1962, and that, therefore, the award of any interest prior to that date to the appellees is not supported by the evidence.

Appellant further contends, on the subject of interest, however, that, if the District Court is correct in holding that any amount became due payable under the Agreement as of thirty days after May 13, 1960, then it follows that the sum that so became due and payable was $85,000.00 and no more, and that, therefore, interest could not properly be allowable on more than this amount.

Appellant also contends that there is an irreconcilable inconsistency in the Findings of Fact, Conclusions of Law, and Judgment, when considered in the light of the undisputed evidence, in that, by them, the District Court holds that the maximum amount in principal which could be payable under the Agreement became due and payable as of thirty days after May 13, 1960, yet, the only way in which this result could be reached was to take into consideration a series of contingent items which occurred after, and some of them substantially after, the date of May 13, 1960.

For these reasons appellant feels that the Judgment should be reversed.

Respectfully submitted,

FORSTER, GEMMILL & FARMER,
By JOHN G. GEMMILL,
Attorneys for Appellant.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

JOHN G. GEMMILL

APPENDIX.

Table of Exhibits.

(References are to Transcript, Volume 11)

Exhibit No.	Identified	Offered	Received	Rejected
1	p.17,1.18	p. 17,1.18	p.18,1. 6	
2	p. 6,1.12	p. 6,1.15	p. 6,1.19	
CA	p. 6,1.24	p. 7,1.11	p. 7,1.13	
AA	p. 5,1. 1	p. 5,1. 5	p. 5,1.16	
AB	p. 6,1. 1	p. 6,1. 3	p. 6,1. 6	
AC	p. 7,1.24	p. 8,1. 2	p. 8,1. 5	
AD	p. 9,1.25	p. 10,1. 7	p.10,1.11	
AF	p.22,1.20	p. 23,1. 1	p.24,1. 4	
AG	p.25,1. 6	p. 27,1.17	p.29,1.20	
AH	p.38,1. 2	p. 43,1.15	p.43,1.19	
AI	p.39,1.22			
DA	p.13,1.24	p. 14,1.24	p.16,1.21	
DB	p.84,1.10	p.110,1. 2		p.110,1. 6
BA	p.56,1.16	p. 56,1.16	p.57,1. 4	
BA-1	p.57,1.10	p. 57,1.10	p.57,1.14	
BA-2	p.57,1.18	p. 57,1.18	p.57,1.24	
BA-3	6.58,1. 1	p. 58,1. 1	p.58,1. 5	
BA-4	p.58,1. 9	p. 58,1. 9	p.58,1.13	
BA-5	p.69,1.20	p. 69,1.20	p.69,1.22	
BA-6	p.69,1.25	p. 69,1.25	p.70,1. 2	
BA-7	p.70,1. 6	p. 70,1. 6	p.70,1. 8	
BA-8	p.70,1.11	p. 70,1.11	p.70,1.13	
BA-9	p.70,1.17	p. 70,1.17	p.70,1.20	
BB	p.58,1.17	p. 58,1.17	p.58,1.21	
BB-1	p.58,1.25	p. 58,1.25	p.59,1. 4	
BB-2	p.59,1. 8	p. 59,1. 8	p.59,1.12	
BB-3	p.59,1.16	p. 59,1.16	p.59,1.20	
BB-4	p.59,1.24	p. 59,1.24	p.60,1. 3	
BB-5	p.70,1.24	p. 70,1.24	p.71,1. 1	

Exhibit No.	Identified	Offered	Received	Rejected
BB-6	p.71,l. 5	p. 71,l. 5	p.71,l. 8	
BB-7	p.71,l.11	p. 71,l.11	p.71,l.13	
BB-8	p.71,l.17	p. 71,l.17	p.71,l.19	
BB-9	p.71,l.22	p. 71,l.22	p.71,l.24	
BC	p.60,l. 7	p. 60,l. 7	p.60,l.11	
BC-1	p.60,l.15	p. 60,l.15	p.60,l.19	
BC-2	p.60,l.23	p. 60,l.23	p.61,l. 2	
BC-3	p.61,l. 6	p. 61,l. 6	p.61,l.10	
BC-4	p.61,l.14	p. 61,l.14	p.61,l.18	
BC-5	p.72,l. 4	p. 72,l. 4	p.72,l. 6	
BC-6	p.72,l.10	p. 72,l.10	p.72,l.12	
BC-7	p.72,l.16	p. 72,l.16	p.72,l.18	
BC-8	p.72,l.21	p. 72,l.21	p.72,l.23	
BC-9	p.73,l. 1	p. 73,l. 1	p.73,l. 3	
BD	p.62,l. 1	p. 61,l.22	p.62,l.19	
BE	p.62,l.23	p. 62,l.23	p.63,l.16	
BF	p.63,l.20	p. 63,l.20	p.64,l. 7	
BF-1	p.64,l.11	p. 64,l.11	p.64,l.15	
BF-2	p.64,l.19	p. 64,l.19	p.64,l.22	
BF-3	p.64,l.25	p. 64,l.25	p.65,l. 3	
BF-4	p.65,l. 7	p. 65,l. 7	p.65,l.10	
BG	p.65,l.14	p. 65,l.14	p.65,l.18	
BH	p.65,l.22	p. 65,l.22	p.65,l.24	
BI	p.68,l.24	p. 66,l. 1	p.69,l.16	